

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

SEP 18 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2007-0118
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DONALD R. PALMER,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20050892

Honorable Edgar B. Acuña, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson

Tucson
Attorneys for Appellee

R. Lamar Couser

Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, Donald Palmer was convicted of attempted first-degree murder, drive-by shooting, and aggravated assault. All charges stem from Palmer’s attack on a former girlfriend. On appeal, he contends the court erred in denying his request for a *Willits* instruction, overruling his objection to a flight instruction, and denying his motion to dismiss based on an alleged violation of his right to a speedy trial. Because the trial court did not abuse its discretion or err, we affirm.

***Willits* Instruction**

¶2 Palmer first argues the trial court erred in refusing his request for an instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). He based this request on his contention that the state failed to preserve potentially exculpatory evidence.¹ He contends that a sample of an unknown substance collected from the victim’s car door was improperly handled and as a result any DNA contained within the substance may have been destroyed. He asserts that, if this evidence had been properly preserved and if it had contained someone else’s DNA, and not his, it would have tended to exonerate him. We review the court’s decision for a clear abuse of discretion. *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

¶3 “A defendant is entitled to a *Willits* instruction upon proof that (1) the state failed to preserve material evidence that was accessible and might have tended to exonerate

¹ Although Palmer mentions in his opening brief that the trial court denied his motion to dismiss based on this issue, he clarifies in his reply brief that he is only appealing the denial of his request for a *Willits* instruction.

him and (2) there [is] resulting prejudice.” *State v. Leslie*, 147 Ariz. 38, 47, 708 P.2d 719, 728 (1985). “A trial court does not abuse its discretion by denying a request for a *Willits* instruction when a defendant fails to establish that the lost evidence would have had a tendency to exonerate him.” *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999); *see also State v. Dunlap*, 187 Ariz. 441, 463-64, 930 P.2d 518, 540-41 (App. 1996) (no error denying instruction when specific contents of allegedly missing document is unknown and assertion that evidence would have aided defense is speculative).

¶4 Here, the substance on the car door was never identified. The crime scene specialist who collected the sample testified that he did not know what it was but it had not appeared to be blood. Nothing in the record shows the substance was biological material or that it ever contained DNA.² Thus, the evidence of the substance’s content was not obviously material and Palmer’s argument that it would have tended to exonerate him is purely speculative. *See Dunlap*, 187 Ariz. at 463-64, 930 P.2d at 540-41; *Perez*, 141 Ariz. at 464, 687 P.2d at 1219 (*Willits* instruction appropriate if lost evidence was “obviously material”). And, as the trial court noted, the presence of someone else’s DNA or the absence of Palmer’s DNA on the victim’s car door would not have excluded him as a suspect. *Cf. State v. Torres*, 162 Ariz. 70, 75-76, 781 P.2d 47, 53-54 (App. 1989) (absence of defendant’s

²Palmer asserts the substance was “sweat, saliva, dead skin, something ‘bodily’ from the donor.” We are unable to find anything in the record to substantiate this claim.

fingerprints on evidence collected but not tested for prints would not have eliminated him as suspect). The trial court did not abuse its discretion in refusing to give a *Willits* instruction.

Flight Instruction

¶5 Palmer next argues the trial court erred in giving a flight instruction. We review the court’s decision to provide a particular instruction for an abuse of discretion. *State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003).

¶6 “A party is entitled to an instruction on any theory reasonably supported by the evidence.” *Id.* An instruction regarding evidence of flight is appropriate “when the defendant’s conduct manifests a consciousness of guilt.” *State v. Speers*, 209 Ariz. 125, ¶ 27, 98 P.3d 560, 567 (App. 2004). Whether a flight instruction was properly given is “determined by the facts of each case.” *Id.* “Leaving the state justifies a flight instruction as long as it invites some suspicion of guilt. Immediate pursuit or concealment, though sufficient, is not necessary.” *State v. Thornton*, 187 Ariz. 325, 334, 929 P.2d 676, 685 (1996); *see also State v. Earby*, 136 Ariz. 246, 249, 665 P.2d 590, 593 (App. 1983) (circumstances surrounding defendant’s leaving state supported inference that flight reflected consciousness of guilt).

¶7 After the victim stated at the crime scene that Palmer was the person who had shot her, police officers immediately began to search for him. They set up surveillance at his home, at his mother’s home, and at “other places that [they] thought he might go.” They found Palmer’s car parked at his mother’s house but did not locate Palmer himself. The

police looked for Palmer at his place of work—where he had apparently been employed full-time—questioned his supervisor and returned repeatedly over the next two months. They were never able to locate him at work. They also questioned his adult son but obtained no information about where Palmer might be. On the morning of the shooting, Palmer had told his adult daughter—with whom he lived—that he was going to get a truck to do yard work at their house. She testified she had not seen him since that conversation and agreed that he had “disappeared.”

¶8 Approximately two months after the shooting, a homeowner’s insurance company contacted the victim and informed her that Palmer was attempting to refinance a house they owned jointly. Based on information obtained from this call, the police located Palmer in Atlanta, Georgia, where he was subsequently arrested. He had a sister who lived in Atlanta, but there is nothing to suggest he had made plans, before the shooting, to visit her.

¶9 Taken as a whole, this evidence reasonably supports an inference that Palmer’s conduct manifested consciousness of guilt. *See Speers*, 209 Ariz. 125, ¶¶ 27-28, 98 P.3d at 567-68; *Thornton*, 187 Ariz. at 334, 929 P.2d at 685. He argues the evidence that he sought to refinance his home “openly and without disguise, alias or other scam” shows he was not trying to conceal his whereabouts. But the other circumstances of Palmer’s leaving the state invite a strong suspicion of guilt and are sufficient evidence to warrant the flight instruction. *See Thornton*, 187 Ariz. at 334, 929 P.2d at 685; *cf. State v. Noleen*, 142 Ariz. 101, 108, 688 P.2d 993, 1000 (1984) (flight instruction warranted even though defendant registered in

motel under own name). Then, the jury was required to decide whether to draw the inference of guilt from all the evidence. *See Earby*, 136 Ariz. at 248, 665 P.2d at 592 (jury free to disbelieve defendant's explanation of conduct and infer consciousness of guilt). The court did not abuse its discretion in giving the flight instruction.

Right to a Speedy Trial

¶10 Palmer next claims the trial court erred in denying his motion to dismiss based on an alleged violation of Rule 8, Ariz. R. Crim. P., and that this deprived him of his due process right to a speedy trial. We review the court's ruling for an abuse of discretion and resulting prejudice. *State v. Spreitz*, 190 Ariz. 129, 136, 945 P.2d 1260, 1267 (1997).

¶11 Palmer concedes that his attorney expressly waived the requirements of Rule 8 for the relevant time period. "[D]elays agreed to by defense counsel are binding on a defendant, even if made without the defendant's consent." *Spreitz*, 190 Ariz. at 139, 945 P.2d at 1270. To the extent Palmer is arguing his counsel was ineffective in failing to obtain Palmer's consent before waiving the time limits of Rule 8, such a claim must be brought in a proceeding pursuant to Rule 32, Ariz. R. Crim. P. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). Because Palmer, through his attorney, waived the time requirements of Rule 8, the court did not abuse its discretion in denying Palmer's motion to dismiss.³

³The express waiver is sufficient to uphold the court's ruling and therefore we need not address Palmer's argument that the court erroneously found the case to be complex and erroneously denied his motion on this basis. *See Perez*, 141 Ariz. at 464, 687 P.2d at 1219 (trial court ruling upheld if legally correct for any reason).

Conclusion

¶12 In light of the foregoing, we affirm Palmer's convictions and sentences.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge